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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. [redacted] 200

CLARENCE D. TIPTON, *Petitioner*

v.

SOCONY MOBIL OIL COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO._____

CLARENCE D. TIPTON, *Petitioner*

v.

SOCONY MOBIL OIL COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 21, 1963, and the denial of the Petition for Rehearing on May 10, 1963.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Appeals, now being brought before this Court, are as yet unreported but appear as Exhibits and are attached hereto.

JURISDICTION

Judgment was entered on March 21, 1963, by the United States Court of Appeals for the Fifth Circuit, Circuit Judge Brown dissenting, printed in Appendix A. The order denying the Petition for Rehearing was entered by the Court of Appeals on May 10, 1963, Circuit Judge Brown dissenting, printed in Appendix C. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

The question presented concerns the consequences of the error in the admission of evidence as to the Longshoremen's and Harbor Workers' Compensation Act and is stated as follows:

Can a jury be expected to give a man a fair trial where it has knowledge of a prior workmen's compensation remedy which had nothing to do with his status under the Jones Act?

STATUTE AND RULE INVOLVED

The statutory provision involved is Title 28 U.S.C., Section 2111; the parallel Federal Rule of Civil Procedure is Rule 61.

Title 28, U.S.C., Sec. 2111.

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, Sec. 110, 63 Stat. 105.

Rule 61, Federal Rules of Civil Procedure.

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Petitioner brought an action under the Jones Act, 46 United States Code, Section 688. Employed and designated by Socony Mobil Oil Company, Inc., as a roughneck on its drilling crew, the petitioner herein was injured while doing seaman's work on the deck of a vessel.

As a member of the drilling crew, Mr. Tipton, the petitioner did have certain duties to perform aboard the tending barge. At the time of his injury, petitioner was standing aboard a cargo vessel moored to the tender and assisting in stacking pipe aboard the cargo vessel. He was caught between a lift of pipe and the side of the cargo vessel with serious resulting internal injuries. The action was brought by Mr. Tipton under the provisions of the Jones Act.

The controlling fact issue presented in the trial court was whether Clarence D. Tipton, the petitioner herein, was a seaman or crew member, and hence within the coverage of 46 United States Code, Section 688, or a drilling employee. The jury in the district court found against the petitioner herein. The decision was then appealed

to the United States Court of Appeals for the Fifth Circuit where the cause was affirmed, with the Honorable John R. Brown, Circuit Judge, dissenting. The petitioner in this Court filed a Petition for Rehearing before the Court of Appeals for the Fifth Circuit, which was denied. Again, the Honorable John R. Brown, Circuit Judge, dissented.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit unanimously held that the evidence as to compensation payments received by the petitioner herein was *not* admissible and that it was error to admit it. The point of difference between the majority and dissenting opinions concerns the consequences of that error.

It is submitted that the erroneous injection of compensation and another remedy brought forth its prejudicial effect by affecting the "substantial rights" of petitioner which is reflected in the judgment.

This Court stated clearly in *Kotteakos v. United States*, 328 U.S. 750, at 764, 90 L. Ed. 1557 at 1566, 66 S. Ct. 1239.

> "To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. *United States v. Socony-Vacuum Oil Company*, 310 U.S. at 239, 242, 84 L. Ed. 1176, 1178, 60 S. Ct. 811."

The constant preoccupation in the record of this case with the Longshoremen's and Harbor Workers' Compensation Act, which was admitted to be erroneous by the Fifth Circuit demonstrates the substantial likelihood of

harmful consequence. In the same connection with this question of likelihood, it has been clearly stated that:

> ". . . if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were *not* affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States*, 328 U.S. at 765, 90 L. Ed. at 1566. (Emphasis added)

The record in this case is replete with myriad references to the Longshoremen's and Harbor Workers' Compensation Act. The numerous references in the record concerning this inadmissible matter are discussed at some length in the dissenting opinion rendered in this cause by the Court of Appeals for the Fifth Circuit and attached to this petition as Appendix A and in the appellant's brief on Petition for Rehearing before the same court, and attached hereto as Appendix B.

Suffice it to say though, that the jury was advised over and over again by evidence, by argument and by the court that there were alternate remedies, and that the appellant had accepted certain compensation benefits. This was formally asserted as a defense. In his initial and extended charge to the jury, the trial court treated it as relevant to this case and apparently it was thought relevant by the jury, as demonstrated by their note of inquiry. After deliberation, the jury sent the Judge a note which read:

> "If we find Mr. Tipton is not a seaman or a member of the crew of drilling barge No. 1, does he have recourse for compensation under the Outer Continental Shelf or other act?" (Tr. 452)

It is readily apparent that in attempting to answer Issue No. 1, the jury did not want to preclude Mr. Tipton, the petitioner herein, from further relief. The detrimental result of the erroneous introduction of the misleading evidence, reflected by the jury verdict and the entire record, could not be removed by an instruction that further confused the issues to be determined.

The majority opinion of the Court of Appeals for the Fifth Circuit stated in conclusion:

> "However, in view of the fact that the jury, having decided the question of status adversely to appellant, never reached the issue of damages, we believe that the error did not prejudice appellant and was harmless." (Appendix A, p. 4)

This is almost impossible to reconcile as it is certain from this record that the evidence was neither offered nor admitted to prove payment in mitigation of damages and equally as certain that the jury's consideration of this evidence was confined to the status question, not that of damages.

The salient fact evidenced from a reading of the record in this cause is that the extraneous and inflammatory matter introduced into this cause, was harmful and prejudicial to the petitioner herein.

CONCLUSION AND PRAYER

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

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1114 Texas Avenue Building
Houston 2, Texas
CA 2-9225

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been sent to George B. Matthews, Esq., 1836 National Bank of Commerce Building, New Orleans 12, Louisiana, properly addressed, return receipt requested and with sufficient postage affixed thereto on this the _____ day of June, 1963.

Clyde W. Woody

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,999

CLARENCE D. TIPTON, *Appellant*
versus
SOCONY MOBIL OIL COMPANY, INC., *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(March 21, 1963)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: Appellant brought this action under the Jones Act.[1] Employed by appellee as a roughneck on its drilling crew, appellant was assigned to an offshore fixed platform which was tended by Drilling

[1] 46 U.S.C. Sec. 688.

Barge No. 1, concededly a "vessel". Although appellant performed his principal duties on the fixed platform, as a roughneck, he did occasionally perform various duties aboard the barge and was injured while doing such seaman's work.

The controlling fact issue before the trial court was whether the appellant was a seaman or crew member, and hence within the coverage of the Act, or a drilling employee. In response to an interrogatory,[2] the jury found that appellant was not a member of the crew of Drilling Barge No. 1.

Appellant first complains that he was prejudiced by the comment of the court to the jury that "the evidence is overwhelmingly to the effect that he was a drilling employee". The statement, taken in context,[3] does not tran-

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[2]"Was the employment of the plaintiff, Clarence D. Tipton, by the defendant, Socony Mobil Oil Company, Inc., such as to constitute him a seaman, or a member of the crew of Drilling

[3]The trial judge initially told the jury:

"Now, in this court, I should tell you, too, that the judge is permitted, if he sees fit to do so, to comment upon the evidence. By that I mean that I am permitted to discuss the evidence with you, to tell you what I think about the evidence, or which witness I think are credible or not. . . . I do expect to discus the facts with you to some extent; but what I want you to understand is that anything I say to you about the facts of the case, any comment I make about the evidence, is intended on my part to be of some help to you in your consideration of the case. It is not intended by me to direct or tell you what your findings should be; and anything I say about the witnesses or about the evidence is not binding, and you are at perfect liberty to disregard it."

The statement of which complaint is made is in the following paragraph:

"I think, in my own judgment — and I might say to you that this is a comment on the evidence which is in no sense

scend the undeniable right of the court to comment on the evidence and does not constitute error.

In connection with the interrogatory as to whether the appellant was a seaman, the court charged: "To constitute one a member of the crew of a vessel, it is necessary that he be permanently assigned to the vessel, or that he perform a substantial part of his work on such vessel, and that his duties contributed to the mission or function of the vessel". Appellant contends that that charge was erroneous, and that the court should have charged, as requested by appellant, that: "The fact that he [appellant] has other duties to perform off the vessel, or on other vessels, or that his principal duties are elsewhere, does not in itself prevent coverage under the Jones Act". In our opinion, the charge given was correct, and the court properly refused the requested charge.[4]

Finally, appellant complains of the overruling of his motion to instruct appellee not to refer to, or introduce into evidence, the fact that appellant had received pay-

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binding upon you — I think the evidence is overwhelmingly to the effect that he was a drilling employee. He was an employee engaged in drilling for, developing and producing natural resources. But his counsel argues, with much force, that he performed other duties on the drilling barge. They emphasize the fact that he spent considerable time mixing mud on the drilling barge, although the mud, of course, was to be used in the drilling operation. They point to the fact that sometimes the drilling crew, in the event of emergency or shorthandedness on the part of the barge's crew, the deckhands, would pitch in and help with some of the deckhands' work, just as the deckhands sometimes apparently would pitch in and help with some of the drilling crew's work."

ments under the Longshoremen's and Harbor Workers' Compensation Act. Appellee argues that the motion was properly overruled because the fact that appellant received such payments went to show that appellant considered himself a drilling employee rather than a seaman; therefore, the fact that appellant received such payments was relevant to the issue of his status. We do not agree. Regardless of what the appellant, at any particular time, thought was his status, the issue of status depended upon objective facts. Appellant's beliefs, being wholly subjective, in no way affected the issue of status and hence was irrelevant. However, in view of the fact that the jury, having decided the question of status adversely to appellant, never reached the issue of damages, we believe that the error did not prejudice appellant and was harmless.

No reversible error appearing, the judgment should be, and it hereby is

AFFIRMED.

BROWN, Circuit Judge, dissenting:

I am in agreement with the Court's opinion and affirmance of the case except as to the error in admission of evidence as to the Longshoremen's and Harbor Workers' Compensation Act. I think this error requires a reversal.[1]

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[1]Offshore Co. v. Robinson, 5th Cir., 1959, 266 F(2) 769. Gianfala v. Texas Co., 1955, 350 U. S. 879, revising Texas Co. v. Gianfala, 5th Cir., 1955, 222 F(2) 382, does not lend any support to appellant's position in this regard.

[1]Were a new trial ordered, I would consider it appropriate that the trial Court in the instruction as to status of a seaman use suitable language to avoid the restrictive emphasis to a vessel or substantial duty performed on "such vessel." The instruction given (quoted in the Court's opinion) was a substantial

We are all agreed that the evidence as to compensation payments and benefits received by the plaintiff was not admissible and that it was error to admit it. Our point of difference concerns the consequences of that error.

The problem is the difficult one of determining whether under the policies reflected by F. R. Civ. P. 61 and the parallel statute[2] the error was harmful. This taxes to the utmost the whole deliberative process. There is no easy solution. The Supreme Court has occasionally cast it in terms of a reversal unless the nonprejudicial effect "affirmatively appears."[3] But as so frequent to verbalize the principle in that form is really to state the problem, not provide a method for solution. If, in the words of the Supreme Court, "substantial rights" are affected, obviously the error cannot be discounted as harmless.[4] The problem begins and ends in judgment. See *Kotteakos v. United States*, 1946, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; *Ahlstedt v. United States*, 5 Cir., 1963, ___ F 2d ___ [No. 19,556 dated ____, 1963]. Illustrating some of the difficul-

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paraphrase of the Offshore Co. v. Robinson, 5 Cir., 1959, 266 F. 2d 769, 1959 AMC 2049. That case dealt with a single vessel. Since that time we have recognized that a person may have a seaman's status with respect to several identifiable vessels of a fleet. Braniff v. Jackson Ave.-Gretna Ferry, Inc., 5 Cir., 1960, 280 F. 2d 523, AMC .

[2]28 USCA § 2111.

[3]"• • • an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it **affirmatively** appears from the whole record that it was not prejudicial." McCandless v United States, 1936, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 and Bihn v. United States, 1946, 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1484.

[4]See 7 Moore, Federal Practice #61.02, pp. 1004, 1005 (2nd ed. 1955).

ties inherent in forming the judgment is the fact that neither the *existence* nor the *absence* of harm can ordinarily be demonstrated.[5] It comes down, then, to a question of *likelihood*.[5a] I believe all would agree that if there is a substantial likelihood of harmful consequence, then reversal is required.

I think several factors weigh heavily toward the likelihood of harm here. Most significant was the preoccupation with this problem of the Longshoremen's Act throughout the whole trial. It began in the defendant counsel's opening statement. He there urged as the defendant's first position, "That Mr. Tipton was an oil field worker, he was injured in connection with an industrial oil field accident, and he has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act * * *." Taking no chances with a faulty recollection he declared at the conclusion of his opening statement to the jury, "Third, lastly, it is our position — and this is basically the same as I said to you

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[5]Post-trial cross examination of jurors to ascertain what went on in the injury deliberation is severely limited in Federal Courts. This policy was reinforced by instantaneous congressional disapproval of experiments aimed at finding out how the jury functions. See 18 USCA § 1508, Act of Aug. 2, 1956, c. 879, § 1, 70 Stat. 935.

[5a]If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The injury cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Kotteakos v. United States, 1946, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557.

at the outset — that the proper remedy, the proper legal remedy that Mr. Tipton has, is not a suit for damages under the Jones Act, but a claim for compensation benefits under the federal act known as the Longshoremen's and Harborworkers' Act, which is made applicable to this type of situation by the so-called Outer Continental Shelf Act * * * and that he has a claim for compensation benefits and has in fact been paid compensation benefits and medical services under that Act."

Almost immediately thereafter the Court at the instance of plaintiff's counsel ruled that reference to claim for, or payment of, compensation benefits under the Longshoremen's Act would not be permitted in the examination of witnesses.[6] But by the time of the first noon recess of the opening day of the trial, the Judge relented. Over objection of the plaintiff's counsel, he ruled that the defendant was entitled to examine on this point "to show that he [plaintiff] has taken an inconsistent position to the one he is taking here." Because the Longshoremen's Act expressly excludes members of the crew of a vessel (33 USCA § 902(3)), the Judge presumably reasoned that this showed that the plaintiff had purposefully "sought and received compensation on the theory that he was not a member of the crew." The Judge summarized it this way: "What this is, actually, is proof of the fact that he assumed that inconsistent position * * *."

Adhering to this changed ruling, the Court over plaintiff's objection permitted the defendant in cross examination of the plaintiff to go into this matter thoroughly. The

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[6]Though a little tardy, this followed the preferred practice of a motion and order in limine. See Davis, The Collateral Source Rule, Tex. Bar Journal, Vo. 26, No. 1 January 1963, p. 31, 32.

plaintiff's oral testimony and two identified "workmen's compensation receipts" formerly offered as exhibits 3 and 4 showed that the plaintiff had received the sum of $508.16 for the first period of disability plus the further sum of $918 for a later one. In the presence of the jury, defendant's counsel in the colloquy justifying the questions stated that "The purpose" of the offer was, number "three, to show that the witness received, accepted, and retained compensation benefits paid to him under the provisions of the United States Longshoremen's and Harborworkers' Act."

Again, the defendant took no chances with a faulty memory of the jury. Extracting the persuasiveness of this evidence — good to the last drop — defendant's experienced and able counsel, countering the jury argument of plaintiff's counsel that the defendant had been almost cynically indifferent to the plight of this injured long-time employee, set the tone of his whole argument to the jury in this way. This "is not a matter of laughter, it is nothing to sneer at, and it is nothing to belittle, as [plaintiff's counsel] would suggest we did * * *. Our sympathy is with Mr. Tipton to the extent that he sustained an accident. But recall that Mr. Tipton is not without a legal remedy. He was paid, as the evidence shows, compensation benefits under the Longshoremen's and Harborworkers' Act, and he was offered further benefits. * * *." Pressing on, defendant's counsel drove this home in dollars and cents. "* * * Mr. Tipton was paid approximately $1400 in compensation benefits, which he accepted and which he retained. * * * He is not without a right [since] * * * we admitted he was covered under the [Longshoremen's] Act. * * * He is not without a remedy; but the lure of a

big damage suit, the possibility of being a seaman, looms on the horizon." More of this was repeated. During the closing arguments of plaintiff's counsel, several objections were made by defendant's counsel in terms again emphasizing that the plaintiff's remedy was under the Longshoremen's Act.

And then to cap it all off the Judge got in the act. To indicate to the jury that all of this permitted reference to the Longshoremen's Act was a vital part of the case to be resolved by them and not just merely a casual excursion into psychologically persuasive evidential details, the Court in its charge to the jury dwelt at great length on the Longshoremen's Act. After six pages of preliminary instructions and definitions, the Court spent six pages of his oral charge on this matter. The Judge first carefully outlined the Longshoremen's Act, the remedy provided by it, and the fact that an injured worker was entitled to those benefits without regard to fault. Next he contrasted this with the Jones Act as one affording recovery for negligence or unseaworthiness. Likewise he contrasted the unlimited nature of the damages under the Jones Act to those under the Longshoremen's Act which "provides a certain recovery, a certainty of recovery but limited in amount * * *." After three pages of this, the Court then proceeded into a discussion of the physical operations for oil exploration in the Gulf of Mexico and the enactment by Congress of the Outer Continental Shelf Lands Act. 43 USCA §§ 1331-1343. After stating that the plaintiff's injuries occurred in offshore oil operations at a place within the Outer Continental Shelf the, Judge then quoted from the Outer Continental Shelf Act to advise the jury that "with regard to disability or death of an employee from an injury

which occurs from the operation or exploration for oil and gas on the Outer Continental Shelf * * *," that Act provides that "compensation shall be payable under the provisions of the Longshoremen and Harborworkers' Compensation Act." Reducing these to the factual situation of the case,[7] the Judge went on, "When he [plaintiff] was injured, what happened? His company * * * apparently considering that he was an employee engaged in the drilling of wells, paid him the benefits provided under the Longshoremen's * * * Act. * * * Those payments were received by Mr. Tipton and retained. * * ." "Mr. Tipton says, 'I wasn't an employee engaged in the drilling or exploration for natural resources, though I took the compensation which I received as such, but I am in fact a member of the crew,' and hence he seeks the larger recovery * * *."

After hearing objections of counsel to the charge, the Court issued supplemental instructions which left this matter ringing in the ears of the jury as they retired. The Judge stated to the jury that an objection of counsel complained that the Court's "earlier charge to you that the fact that Mr. Tipton had accepted these benefits under the Longshoremen * * *" perhaps suggested that the "* * * Act precluded him as a matter of law from maintaining this suit on the theory that he was a seaman." To clarify this, the Court then stated: "That, of course, is not the

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[7]The Court's comments were here directed to special interrogatory No. 1 (F. R. Civ. P. 49):

"Was the employment of the plaintiff * * * by the defendant * * * such as to constitute him a seaman or a member of the crew of the drilling barge No. 1."

The jury was expressly instructed not to answer the succeeding 7 issues inquiring as to negligence, unseaworthiness, damages, etc. if they found plaintiff not to be a seaman.

case. The suit is before you for decision, and in the event in truth and in fact he was a seaman *all* the while, he would be entitled to a seaman's remedy, even though he had accepted the compensation benefits heretofore."

But this is nowhere near the end of the tale. The jury retired to deliberate. Inquiry revealed that agreement had not yet been reached so the jury was excused about 6:30 p.m. to return the following morning. After resuming deliberations in the morning, the jury sent the Judge an inquiring note which read:

> "If we find Mr. Tipton is not a seaman or a member of the crew of drilling barge No. 1, does he have recourse for compensation under the Outer Continental Shelf or other act?"

To this the Court made instant handwritten response.[5]

> "This is not a matter for the jury's consideration. You should consider only the questions submitted and the evidence thereon."

Thus it was literally that the trial opened and closed with the major theme. Recurring again and again "like a haunting melody" was this opening refrain: the plaintiff is subject to the Longshoremen's Act and is entitled to receive compensation benefits thereunder.

This was formally asserted as a defense, as such. In his initial and extended charge to the jury, it was treated ex-

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[5]Counsel were not advised of the receipt of the inquiry or the Court's response until after the verdict was received and the jury discharged. Complaint is made of the legal sufficiency of this answer. For my purposes, I can assume that this procedure was permissible and the answer technically correct.

tensively by the Court as relevant to the case. And as demonstrated by their inquiry note, it was thought to be relevant by the jury. At that stage it was then way too late for the Judge to erase all that had gone. There was then no way to eradicate all that the jury had heard both from counsel and from the Judge.

It is perfectly plain to me that in trying to fashion their answer to issue No. 1 (note 7), supra), the jury did not wish to take any action which would cut the plaintiff off from further benefits. Granted that this was entirely irrelevant to the issues for their decision, their note of inquiry shows what was in their mind. And the trial Court had to take the full blame for it being there. For it was the trial Judge who changed his earlier ruling to let it in. It was the trial Judge who permitted extensive cross examination on this matter over objection of the plaintiff. It was the trial Judge who explained fully how the Longshoremen's Act worked and what it provided. If, as now argued, it was immaterial to the case, it ought never to have been there. But it was and it could not be removed by a simple statement.[9]

In light of this preoccupation with this problem, I think it takes more than the simple statement in the majority's opinion that "* * * the error did not prejudice appellant and was harmless." With no further illumination this re-

[9]Indeed, in this casual effort to expunge it all, the trial Judge was most inaccurate in admonishing the jury that "you should consider only the questions submitted * * *." I would assume that by reference to "questions submitted," he is there talking about his charge. I am sure the jury treated it thus. It was the trial Judge who at great length had discussed the Longshoremen's Act and its significance for an oil field worker injured in the geographical area of the Outer Continental Shelf.

sults from "* * * the fact that the jury * * * having decided the question of status adversely to appellant, never reached the issue of damages." But of all the things that are clear is the fact that this evidence was neither offered nor admitted to prove payment in mitigation of damages. Moreover, in the sequence reflected by the Judge inquiry note and the fact that only Issue No. 1 was answered, it is certain that jury consideration of this evidence was confined to the status question, not that of damages.

The Court's clear holding (in which I join) that such testimony is inadmissible[10] serves as a warning that if this occurs in future cases, the judgments cannot stand. More important, it serves to guide careful trial Judges from allowing this extraneous, but inflammatory, matter to enter the case. Thus the only person who will ever run the risk of harm is Tipton, this plaintiff.

It is difficult for me to see — or for me to understand how Judges can say — that the sole victim suffered no harm.[11]

I therefore respectfully dissent.

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[10]Evidence of payments received by an injured party from a collateral source should ordinarily be excluded, see A. H. Bull Steamship Co. v. Ligon, 5 Cir., 1960, 285 F. 2d 936, 937, —AMC—, or use carefully confined. Cf. Page v. St. Louis Southwestern Ry., 5 Cir., 1962, — F. 2d — [No. 19756 dated January 3, 1963]; Simmons v. Union Terminal Co., 5 Cir., 1961, 290 F. 2d 453, 454; Davis, The Collateral Source Rule, Tex. Bar J., Vol. 26, January 1963, p. 31.

[11]As it is certain that this careful trial Judge made all of his rulings in the genuine belief that the evidence (and comment) was admissible, the minimum now required would be to send the case back for the Judge to evaluate the motion for new trial in the light of our categorical disapproval of his basic ruling.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19,999

CLARENCE D. TIPTON, *Appellant*
versus
SOCONY MOBIL OIL COMPANY, INC., *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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PETITION FOR REHEARING

To The Honorable Court of Appeals for the Fifth Circuit:

Clarence D. Tipton, appellant named above, presents this petition for rehearing in the above entitled case and in support thereof respectfully shows:

I.

The Court erred in admitting evidence as to the Longshoremen's and Harbor Workers' Compensation Act. The

consequent result of that error affected "substantial rights" of the appellant and was most certainly harmful to him for the following reasons:

The Federal Harmless Error Statute, Federal Rule of Civil Procedure 61 and the parallel statute, 28 U.S.C.A. §2111, do nothing to change the presumption of prejudice invoked here. The statute is phrased in terms of "technical errors" and those affecting "substantial rights", but it provides no criteria for distinguishing between them. The Supreme Court of the United States has regarded the statute as aimed solely at preventing reversal for merely formal errors. For example, see *Bruno v. United States*, 308 U.S. 287, 294 (1939), wherein it was stated: "That act was intended to prevent matters concerned with the mere etiquette of trial and with the formalities and minutiae of procedure from touching the merits of a verdict." If an error affecting "substantial rights" has been committed, it will be presumed prejudicial, the burden being on the respondent to show that on the whole record it was harmless. *McCandless v. United States*, 298 U.S. 342 (1936); *Williams v. Great Southern Lumber Company*, 277 U.S. 19 (1928); *United States v. River Rouge Co.*, 269 U.S. 411 (1926).

Hence; there are two stages of inquiry: (1) Is the error technical or does it affect substantial rights?

(2) If it does affect substantial rights, is the presumption of prejudice rebutted?

The dual nature of this inquiry is clearly indicated by the language of the Supreme Court in *McCandless v. United States*, 1936, 298 U.S. 342, 56 S. Ct. 764, 80 L.Ed. 1205, in its discussion of the effect of the Federal Harmless Error Statute:

> "That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties'. This . . . does not change the well-settled rule than an erroneous ruling *which relates to the substantial rights of a party* is a ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

In any event, if "substantial rights" are affected, obviously the error cannot be discounted as harmless. *Kotteakos v. United States*, 328 U.S. 750, 90 L.Ed. 1557, 66 S. Ct. 1239 (1946). *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

The cases reveal that the answer to the first inquiry resolves itself into a determination of the degree of probability that the error affected the verdict regardless of what form the error took. (*Rice v. United States*, 149 F. 2d 601, 604 (C.C.A. 10th 1945); *Worcester v. Pure Torpedo Co.*, 127 F. 2d 945 (C.C.A. 7th 1942); *University City v. Home Fire & Marine Ins. Co.*, 114 F. 2d 288 (C.C.A. 8th, 1940); *United States v. Dressler*, 112 F. 2d 972 (C.C.A. 7th 1940); *Little v. United States*, 73 F. 2d 861 (C.C.A. 10th 1934).

It is submitted that the most desirable standard to use in answering the question is to require an *appreciable* degree of probability that the error influenced the result, but not necessarily that it be more probable than not that it did. Any more stringent requirement would deprive appellants of the opportunity for reversal because of errors which may well have affected the verdict. This is essentially the position of Judge Brown, in his cogent dis-

sent, wherein he states, "It comes down, then, to a question of likelihood," referring to *Kotteakos v. United States,* supra.

In the instant case, there has been an "appreciable" degree of probability that the error influenced the result or as Judge Brown clearly and succinctly noted, a "likelihood" of harm.

The entire record reflects a "likelihood" of harm. First, the entire court was in agreement that the evidence as to the compensation payments and benefits received by the plaintiff was not admissible. However, throughout the original trial in this cause, it is apparent that the Longshoremen's and Harbor Workers' Compensation Act was of paramount concern, both to attorney for appellee and the trial court itself.

Without attempting to demonstrate the myriad references to the Longshoremen's and Harbor Workers' Compensation Act, a few salient illustrations will show the preoccupation with this evidence that should have been excluded.

Initially, defense counsel boldly reiterated in his opening statement "that the proper remedy, the proper legal remedy that Mr. Tipton has, is not a suit for damages under the Jones Act, but a claim for compensation benefits under the federal act known as the Longshoreman's and Harborworkers' Act which is made applicable to this type of situation by the so-called Outer Continental Shelf Act, an act specifically designed for such purpose, and that he has a claim for compensation benefits, and has in fact been paid compensation benefits and medical services under that Act." (Tr. 23)

Subsequently, the court over Plaintiff's objections permitted the defendant in cross-examination of Mr. Tipton, the plaintiff, to go into this matter thoroughly. Before the jury, the defendant's counsel was allowed to show that Mr. Tipton, the Plaintiff and Appellant herein, received, accepted and retained the benefits paid to him under the provisions of the United States Longshoreman's and Harbor workers' Act. At the conclusion of his offer of the exhibits designated "Workmens' Compensation Receipts," Appellee's counsel stated as follows:

> "Mr. Matthews: *The purpose we offer these exhibits is to show, one, the payment of compensation,* two, to refresh the witness' recollection as to the period that he worked at the gas plant in Lake Charles; and, three, *to show that the witness received, accepted, and retained compensation benefits paid to him under the provisions of the United States Longshoremen's and Harbor Worker's Act.*
>
> "The Court: All right, sir . . . I think it is admissible for the purposes stated, and I will receive it for that purpose." (Tr. 161)

The injurious effect of this inadmissible evidence was again hammered home in defendant counsel's argument (Tr. 388) and the court's six pages of preliminary instructions and definitions and six pages of charge on the Longshoremen's Act did nothing but aggravate the error committed in the admission of this inadmissible and severely damaging evidence. After the objections to the charge were entered, the Court issued supplemental instructions concerning the Longshoremen's Act. (Tr. 444).

Though the minds of the jurors cannot be examined and whether they have been affected cannot be definitely ascertained, there are certain manifestations in this case which give an indication that the verdict was influenced by the erroneous matter. After deliberation, the jury sent the judge a note which read:

> "If we find Mr. Tipton is not a seaman or a member of the crew of drilling barge No. 1, does he have recourse for compensation under the Outer Continental Shelf or other act?

The court answered in writing as follows:

> "This is not a matter for the jury's consideration. You should consider only the question submitted and the evidence thereon." (Tr. 452)

It is apparent that in attempting to answer Issue No. 1, the jury did not want to preclude Mr. Tipton, the Appellant, from further relief. The detrimental results of the introduction of the incompetent and misleading evidence, reflected by the jury verdict and the entire record, could not be removed by an instruction that further confused the issues to be determined.

It is therefore submitted that if the error is determined to have affected substantial rights, i.e., might have affected the verdict, it is presumed to have done so. Certainly, this is the case here. The reviewing court here must scrutinize the evidence adduced on the trial on the theory that, if the jury would have found the same verdict in the absence of the error, the error did not influence the verdict and was harmless. The majority opinion in the instant case apparently feels that if all that is required is some evi-

dence to sustain the verdict for appellee, the question on appeal becomes the same in cases where error has occurred in the course of the trial as in cases where the only error has been the refusal of the trial judge to direct a verdict for the appellant. Therefore, under this theory, every error but failure to direct a verdict might be considered harmless. For example, an appeal could be directed only to the sufficiency of the evidence to sutain the verdict. This could be justified only on the assumption that a jury never considers erroneous matters. If that be so, how could a jury be fallible enough to render a verdict where the evidence is insufficient? (See *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, 642, 650 (C.C.A. 2d 1946) (dissenting opinion), for a discussion of the distinction between reviewing as to the weight of the evidence and determining whether an error is harmless.

If there is a "likelihood" that an error affected the verdict, the only situation in which an appellate court would be justified in considering it harmless is one where the evidence is such that the trial court would have been justified in directing a verdict for the appellee. Whenever the appellant introduced sufficient evidence to take his case to the jury, there exists the possibility that the jury might have found a verdict for him had the error not intervened. Certainly a verdict for appellee should not be permitted to stand if the jury, in the absence of the erroneous matter, would have been justified in finding for the appellant. *Templeton v. United States*, 151 F. 2d 706 (C.C.A. 6th 1955).

Only with such a standard as set out in this brief, or to phrase it differently, if, disregarding the matter complained of, no reasonable jury would have come to any other

verdict, can the appellate court validly assert that it is not usurping the function of the jury. For unless the weight of the evidence is so overwhelming against the position of appellant, no conclusive determination can be made as to the effect of the error on the verdict.

It is abundantly clear from the entire record and its continuous references to the Longshoremen's and Harbor Workers Act and the salient fact that only Issue No. 1 was answered by the jury; that certainly the jury's consideration of the evidence was limited to the question of the status of Mr. Tipton, the appellant, and that their consideration was not directed to the question of damages. Further, the evidence was never offered or tendered to show mitigation of damages but as appellee stated,

> ". . . the purpose of the offer was . . . to show that the witness received, accepted and retained compensation benefits paid to him under the provisions of the United States Longshoremen's and Harbor Workers' Act."

Since the entire court, both in the majority and dissenting opinion, clearly recognized the inadmissibility of such testimony, the writer of this brief has confined much of his discussion to the prejudicial effects of such testimony. For no man could quarrel with a rule that where an error might have affected the verdict, there should be reversal unless it be clearly shown that the error actually did not affect it.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

CLYDE W. WOODY, ESQ.
1114 Texas Avenue Building
Houston 2, Texas
CA 2-9225

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk
May 10, 1963

Post Office Box 23
New Orleans 6, La.

Re: No. 19,999

CLARENCE D. TIPTON, *Appellant*

versus

SOCONY MOBIL OIL COMPANY, INC., *Appellee*

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing

in the above case. No opinion was rendered in connection therewith.

Brown, Circuit Judge, Dissenting.

Very truly yours,

EDWARD W. WADSWORTH

Edward W. Wadsworth
Clerk

Mr. Richard Henderson
Attorney at law
Victoria, Texas

Mr. Clyde W. Woody
Attorney at law
Houston, Texas

Mr. George B. Matthews
Attorney at law
New Orleans, La.

Mr. William H. Tabb
Attorney at law
Dallas, Texas.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 19,999

U. S. Court of Appeals
Filed May 31, 1963
Edward W. Wadsworth, Clerk

CLARENCE D. TIPTON, *Appellant*

versus

SOCONY MOBIL OIL COMPANY, INC., *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

BY THE COURT:

ON CONSIDERATION OF THE MOTION of Appellant for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court at Corpus Christi, Texas, on

May 23, 1963, be recalled and stayed to and including July 9, 1963, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above menitoned certificate shall be filed with the Clerk of this Court within that time.